

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION I

CACR 05-1223

SEPTEMBER 27, 2006

SHIRLEY ANN TORRES-ANAYA
APPELLANT

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT
[NO. CR-2002-1410-1]

V.

HONORABLE WILLIAM A. STOREY,
JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

Appellant Shirley Ann Torres-Anaya pleaded guilty to Class B felony theft by receiving on October 11, 2002, and was placed on twelve years' probation. Appellant's conditions of probation included maintaining employment and paying \$14,416.24 in restitution at a rate of \$105.67 per month. Another condition was that she be truthful in all statements made to her supervising officer.

On March 1, 2005, the State filed a motion to revoke appellant's probation. After hearing testimony, the trial court revoked Ms. Torres-Anaya's probation on the basis that she had not been truthful with her probation officer, failed to maintain steady employment, and failed to pay restitution with no reasonable excuse. Ms. Torres-Anaya was sentenced to six

years in prison and now appeals, arguing that the State failed to prove that she violated her conditions without a reasonable excuse.

To revoke probation or a suspended sentence, the trial court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003). As a determination of the preponderance of the evidence turns heavily on credibility and weight to be given the testimony, we defer to the trial court's superior position in that regard. *Cavin v. State*, 11 Ark. App. 294, 669 S.W.2d 508 (1984). In order for appellant's probation or suspended sentence to be revoked, the State need only prove that the appellant committed one violation of the conditions. *Rudd v. State*, 76 Ark. App. 121, 61 S.W.3d 885 (2001). On appellate review, the trial court's findings will be upheld unless they are clearly against the preponderance of the evidence. *Thompson v. State*, 342 Ark. 365, 28 S.W.3d 290 (2000).

At the revocation hearing the State presented the testimony of appellant's probation officer, Heather Allison. Ms. Allison testified that Ms. Torres-Anaya has had problems keeping steady employment, and that she has lied about her employment status. On one occasion, Mr. Torres-Anaya reported that she was working for Double Tree, but when Ms. Allison called to verify she was told that appellant had never worked there. Ms. Allison stated that appellant "is not truthful at all," and that, "When I discussed her lying to me in the office visits she has admitted it and apologized." Ms. Allison testified that while

appellant has paid some of the restitution, she went almost a year without paying and was a little more than \$700.00 behind.

On cross-examination, Ms. Allison testified that appellant has mentioned that she has health problems. According to Ms. Allison, appellant brought her papers indicating that she had been diagnosed with lupus, asthma, and arthritis, and appellant also claimed to have cancer. Ms. Allison did not think Ms. Torres-Anaya had reported any psychological problems, although she did mention the possibility of being suicidal.

Ms. Torres-Anaya testified on her own behalf, and indicated that Ms. Allison's testimony was accurate. She acknowledged that she has had problems staying employed, but maintained that this was due to her multiple illnesses. In this regard, Ms. Torres-Anaya stated she has arthritis, lupus, and experiences migraine headaches. She also stated that she was diagnosed with throat and lung cancer two years ago, but has not been treated because she cannot afford it. Appellant further stated that she has problems being around people, which causes her to pass out or get sick. Appellant explained that she lied to Ms. Allison about her employment because she was afraid she would have her probation revoked and lose her children.

Ms. Torres-Anaya acknowledged being behind on her restitution, but stated at the hearing that she had \$900.00 to pay toward it. She stated, "If I were placed back on probation today I understand that I would have to do everything that Ms. Allison tells me

to do.” Appellant stated that she was recently hired at a retirement home called Garden’s of Arkanshire where she continues to work.

Appellant’s daughter testified on her behalf and stated that her mother has had various jobs in the past. However, she maintained that appellant has health problems to where there are times that she has to stay in bed and cannot get up and do anything.

The trial court took additional evidence regarding appellant’s revocation at the sentencing hearing, where the trial court stated, “I set the sentencing hearing for today, primarily to give the defendant an opportunity to fully comply with the conditions of probation.” At the conclusion of that hearing, appellant’s counsel again asked the trial court not to revoke her probation, but the trial court reiterated its decision to revoke, based in part on the additional testimony presented. The relevant additional testimony was by Ms. Allison, who stated that she contacted Garden’s of Arkanshire and spoke to the manager who stated appellant had never worked there. Ms. Allison further testified that she obtained medical records and spoke with a nurse, and that she verified that Ms. Torres-Anaya has never been diagnosed with throat cancer, lung cancer, or lupus.

For reversal of her revocation Ms. Torres-Anaya argues that, although she undisputedly violated her probation, she had a reasonable excuse. In *Baldrige v. State*, 31 Ark. App. 114, 789 S.W.2d 735 (1990), we held that once the State introduces evidence of non-payment in a revocation hearing, the defendant then bears the burden of going forward with some reasonable excuse for his or her failure to pay. Ms. Torres-Anaya submits that

she met that burden given the evidence of her medical problems and how they interfered with her ability to work. Appellant contends that because of her medical problems she was unable to maintain steady employment, and because she was unable to maintain steady employment, she was unable to make payments on her restitution as required by her probation.

We hold that the trial court's finding that appellant inexcusably violated her probation was not clearly against the preponderance of the evidence. While Ms. Torres-Anaya testified that various illnesses prevented steady employment, the trial court was not obligated to believe her testimony, and chose not to do so amid evidence that Ms. Torres-Anaya had been untruthful to her probation officer in the past. It was further established at the sentencing hearing that appellant had been untruthful under oath when she represented that she was currently employed and was afflicted with cancer and lupus. Moreover, the appellant indicated at the hearing that she had the ability to work and could pay the restitution arrearages. Thus, we affirm the trial court's finding that Ms. Torres-Anaya failed to establish a reasonable excuse for failing to maintain employment and pay restitution.

Moreover, even Ms. Torres-Anaya acknowledged in her testimony that she lied about her employment to her probation officer, which was a clear violation of the express condition that she be truthful to her supervising officer. In her brief appellant fails to address this violation, and it alone was sufficient to support the trial court's decision to revoke her probation.

Affirmed.

GLADWIN and BAKER, JJ., agree.